ALLAN [illegible]

Supreme Court

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CHARLES [illegible]

BRIEF FOR DEFENDANT IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 244.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

v.

CHARLES E. SEVERE, BY WILLIAM B. SEVERE, HIS NEXT FRIEND.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

On the 31st day of August, 1902, the plaintiff in this case was struck by one of the defendant's cars near Riverdale, Maryland. William B. Severe, the plaintiff's father, lived at Riverdale with his family, consisting of his wife and four children and his own father. At the place where the accident occurred there is a plank crossing which had been constructed by the Maryland Traction Company, the predecessor of the company for which the defendant is receiver. This was done under a contract with the Riverdale Park

Company in consideration of the right of way granted the railroad company through Riverdale (28-29).

It was admitted at the trial "that the railroad company put the planks down that made the crossing in question and that the defendant as its successor is responsible for it" (18).

The track at the point where the plank crossing had been constructed crosses a street which had been laid out, but which was open only to the west side of the track. At the crossing there was no thoroughfare for vehicles, but pedestrians had worn a foot path on the side of the track opposite Riverdale. The crossing was one of the regular stopping places for the cars, there being a sign "Cars Stop Here" on both sides of a telegraph pole at the crossing. And, of course, persons returning from Washington getting off at this place would naturally use the crossing in getting over to the Riverdale side of the tracks.

At the time of the accident, the plaintiff, who is usually called by his middle name, Earickson, was six years and ten months old, and his youngest brother, Raymond, was a little over five years old (15). His brother Eddie was eight years and ten months old. These three were present at the time of the accident.

It is stated in the brief of plaintiff in error "that these and other boys had been in the habit of standing on the track at that and other points in that vicinity until the car got very near them and then jumping off as the car got close to them." While it is quite true there was some evidence to this effect, Eddie and Earickson each testified that he had never done this, and had never seen any of his brothers do it (36-37). It was, therefore, a question for the jury to decide, and it will not do for the appellant's counsel to assume that the jury believed their witnesses and disbelieved the boys.

On the Sunday afternoon in question these boys had gone down to the railroad to meet their parents, whom they ex-

pected to return then from a trip to the seashore (10, 11, 13, 14, 16).

According to the motorman's report, made to the company on the day the plaintiff was injured, the accident happened at a little after 3 o'clock in the afternoon (21). The boys had been notified that their parents expected to return about 2 o'clock that afternoon (13). They went down to the railroad about that time and, according to their testimony, sat or played around what in the evidence is called the Power House, a building a short distance west of the crossing. Thinking they heard a car coming from Washington, they went to the crossing, but their parents did not come at that time. Both Eddie and Earickson testified that at this point Eddie went to his father's house to get a drink of water and did not get back to the vicinity of the crossing until a few seconds before the accident (10, 16). The plaintiff testified that while Eddie was at the house the youngest boy, Raymond, caught his foot in the space between the westernmost rail and the plank on the inside of the rail; that he, Earickson, helped Raymond to extricate his foot, and that almost immediately his own foot got caught in the same place. Raymond ran back to the house to notify Eddie that Earickson's foot was caught. Raymond met Eddie at the gate and the two together ran back to the crossing. When they got there the car was in sight, and before anything could be done to extricate Earickson from his dangerous situation the car ran over his leg and inflicted such injuries that his leg had to be amputated.

The details of the occurrence will be considered in dealing with the several assignments of error.

At the request of the defendant's counsel the jury were instructed, in addition to rendering a general verdict, to state also whether the defendant was guilty of negligence in the construction of the crossing; whether he was guilty of negligence in the management of the car; and whether the motorman did all in his power to stop the car after he saw the plaintiff's foot was caught. The first two questions the jury

answered in the negative, and as to the third the jury could not agree (46).

There was a verdict in favor of the plaintiff for $15,000. The judgment entered on that verdict was affirmed by the Court of Appeals.

If the defendant's counsel had been content with a general verdict they would have been entitled to a new trial in case of any serious misdirection of the jury by the court as to the law bearing upon either of the two points as to which the jury rendered a special verdict; but it is obvious that as the case stands the judgment of the Court of Appeals must be affirmed, unless this court should be satisfied that the trial court erred in giving the law to the jury, both as to the matter of construction and as to the matter of the management of the car.

ARGUMENT.

AS TO THE QUESTION OF DEFECTIVE CONSTRUCTION.

According to the testimony of the plaintiff's father, the space between the top of the rail and the plank was 2 11-16 inches (14, 15). According to Lackey, defendant's witness, whose method of measurement was to try to jam his own shoe-heel into the space, and then go home and measure his heel, it was a scant 2⅛ inches (26). As the rail was a T rail, the space between it and the plank was necessarily wider below the top of the rail. If the construction had been intended for a trap for a child's foot, it could hardly have been made more ingeniously. The extreme danger of such a construction is manifest from the fact that the youngest boy, Raymond, caught his foot in it, and the plaintiff immediately after extricating his brother had his own foot caught in the same place (16).

The principal question of law involved in this branch of the case grows out of the refusal of the trial court to grant

the defendant's fifth prayer (40), which was in substance that if the jury should find that traps of this kind were common among the railroads of this country, and that no accident had before this resulted in the District of Columbia or elsewhere "to the knowledge of the defendant's officers or agents," and that a reasonably prudent man would not have anticipated such *an accident* from such a construction, then their verdict should be for the defendant. This request was also coupled with another instruction (No. 4, 39, 40), which relates to the negligence of the motorman, and which will be hereafter considered.

As to this instruction No. 5, it should be carefully noted in the first place that the instruction itself and all the evidence upon which it was based refers not to whether the feet of little children had been caught in such a trap before, but to whether any *accident* had ever resulted therefrom. So far as the evidence on this point is concerned, it may well be that the defendant's officers knew that every year hundreds of children had had their feet caught at the various crossings in the District of Columbia constructed like the one in question. It is obvious that many children might have their feet caught before one would be hurt, because ordinarily the trolley car is an easily controlled machine, and motormen in general are careful when they see little children on the track.

But a greater objection to the theory of this instruction is that it takes no note of the fact that, whether it was customary or not to leave such a space between the plank and the rail, it was not necessary that that space should be left wholly unfilled. As to that point the defendant's witness, De Rene, testified that he "did not know of any standard about the depth" of the space between the rail and the plank at these crossings.

Mr. Lewin, for the plaintiff, testified that at two plank crossings on the road of this defendant, one at Melrose and one at Hyattsville, the space between the rail and the plank

was kept filled up, so that there was barely space for the flange of the wheels: "that it was like two dies, one fitted into the other;" that if there was a sheet of paper there it could be mashed down by the flange as it crossed: that at the place where the accident happened it was entirely different (37).

And the practically uncontradicted evidence of the plaintiff's father showed that just after the accident the hole where the plaintiff's foot was caught was about two inches deep (15), but that two months afterwards the space between the plank and the rail was filled in with sand and gravel nearly to the level of the board (15, 35).

Mrs. Severe, the plaintiff's mother, saw the railroad men while they were engaged in the work of filling in at the place in question (36).

Absolutely no reason has been shown for maintaining such an obviously dangerous place at a crossing.

Mr. Lackey admits, and of this the court will take judicial notice, that the same cars with the same wheels and the same flanges run through the city streets, and that in the city no such space is required or used for the operation of the flange (27).

Fuller, another of the defendant's witnesses, testified "that the flange at a level with the surface of the wheel was three-quarters of an inch and tapered to practically nothing;" that it is a peculiar shape; it is round rather than coming to a sharp edge; that in the city they have a space for the flange one inch wide (32).

Allen, another of the defendant's witnesses, is a contractor who builds these crossings. He says that the space between the plank and the rail is "left because if anything got in on the track like a piece of ballast, the flange would strike it and press it down so that it would not derail the car; that a piece of stone tightly wedged between the planking and the rail that the wheel could not press down would derail the car; that the space is left for the purpose of guarding against the danger of derailment" (31).

On cross-examination Allen testified in substance that "they have to regulate the size of their space by the size of the stones; that the stones were from two to two and a half inches, and generally gave them a two-inch space, and in the course of time these stones work out on the side; and that you have to keep working on that to keep them in good repair; that if the *stones should work out, it would leave the space deeper*" (31).

Hence, on the showing made by the defendant itself, the space in question is made so that it can be partly filled up with stones and only sufficient space left for the flanges to play, and a space one inch wide is sufficient for that purpose, the flanges themselves being only three-quarters of an inch wide.

The instruction under consideration omits any reference to this fact. It amounted to asking the court to instruct the jury that if it was usual to leave such a space a little over two inches in width the defendant could not be held liable, even though it was customary also to fill up the space, so that a child's foot could not be caught in it, and even though in this particular case the defendant had neglected that duty.

Moreover, it is perfectly plain that the danger could have been obviated without interfering with the safe and convenient operation of the road by the simple expedient of beveling the plank, so as to make the opening wider at the top than anywhere else.

On this point we refer to Spooner *v.* D., L. & W. R. Co., 115 N. Y., 22, in which case, when considering a case almost identically like this, the court said:

"Whether the crossing was defectively built and maintained was properly submitted to the consideration of the jury. The plank at the point of the accident was new and laid parallel with the rail on its inside and two and a half inches therefrom. It was laid with a straight edge, and the opening thus made for the flanges of passing wheels was the one in which the child's foot was caught. The other planks at the same crossing had the edge of the plank parallel to

the rail beveled off or rounded so that at the bottom it touched the rail and the flanges had room to pass, while no opening such as to catch or fasten an incautious foot was left. There is evidence that a similar mode of construction existed at many other crossings of the company, and was uniformly used upon some other railroads, although many retained the straight edges. The beveled edge seems to be an obviously prudent mode of construction, known to the company and adopted by it at this very crossing. It prevents any such possible trap for a child's or a woman's foot as is created by the straight edge, and while such an accident had never before occurred in the history of the company, its possibility was quite obvious to an ordinary observation. Many accidents have occurred from feet becoming caught in a frog, and such incidents should have naturally drawn attention to the similar danger where unrounded plank were laid at crossings. It was not error, therefore, to submit the question of defective construction to the jury."

Other cases of children catching their feet in such an opening and being run down by the cars are Stebenau *v.* R. Co., 155 N. Y., 511, and O'Conner *v.* R. Co., 135 Mass., 352. In the last-mentioned case the court held that instructions substantially the same as the prayers of the plaintiff in error in this case were properly rejected.

In Railroad Company *v.* Stout, 17 Wallace, 661, 662, this court said:

"That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the road-bed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents."

In Union Pac. Co. *v.* McDonald, 152 U. S., 262, 282, 283, this court held that the defendant was liable *as matter of*

law, because of a trap into which a child was shown to have been led in that case.

So in Choctaw, &c., R. Co. *v.* McDade, 191 U. S., 67, it was held that *as matter of law* it was negligence to leave a spout hanging over a railway track in such a way that a person standing on top of a car might be struck by it.

The court of civil appeals of Texas in Gulf, &c., R. Co. *v.* Shelton, 69 S. W. Rep., 363, held *as matter of law* that it was negligence to leave a space of twelve or thirteen inches between the lower step of a railroad car and the edge of a platform where passengers were to alight.

To meet this difficulty counsel for the plaintiff in error claim that whether the construction in question was a dangerous trap or not, the plaintiff in error is not liable because similar traps are in use all over the country. There may be cases like Asphalt Company *v.* Mackey in the Court of Appeals of the District of Columbia (15 App. Cas. D. C., 410), in which it is held competent to show that a piece of machinery is in common use, but such cases have no application here, nor will it avail in such a case as this to offer evidence tending to show that no like accident had occurred before.

It has been held by this court in a number of thoroughly considered cases that, in actions to recover damages for personal injuries, where the question is whether the conduct of the defendant resulting in the accident was negligent, or whether proper care had been used by the defendant in constructing or operating that which caused the injury, it is not competent in many cases to show at all, and in no case is it conclusive, when shown, that such conduct, operation, or construction is in accordance with the general custom and usage in like situations and cases. It was so held in Grand Trunk R. R. Co. *v.* Richardson *et al.*, 91 U. S., 454-469, where the question was as to the usual practice of railroad companies in employing a watchman for a certain kind of bridges; in The

Umbria, 166 U. S., 404-409, where evidence was rejected that it was customary for large passenger steamers carrying the mails to run at full speed in a fog, and that this was really the safer course for them; in Wabash R. Co. *v.* McDaniels, 107 U. S., 454-461, where the railroad company unsuccessfully contended that in selecting its employés it was sufficient to observe that degree of care which other like corporations are accustomed to observe; in Texas & Pac. R. Co. *v.* Dehymer, 189 U. S., 468, where this court, in speaking of the handling of a train of railway cars, said:

"What ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not."

There are innumerable cases in other courts to the same effect.

In Henion *v.* R. R. Co., 25 C. C. A., 223, where the plaintiff while standing on a platform was injured by a passing train, it was held that it was obvious that the platform was too near the rails, and that it was not competent to show that it was the custom of that and other railroads to construct platforms in that way.

In Mayhew *v.* Mining Company, 76 Me., 111, it was held no defense for neglecting to provide a railing around a ladder-hole in a mine that it was not the custom of mine-owners to do so—the court saying that custom and average have no proper place in the determination of what is ordinary care.

In Cleveland, &c., R. Co. *v.* Walter, 147 Ill., 60, 64, the court excluded evidence as to the usual height of bridges on other roads.

In Lake Erie R. Co. *v.* Mugg, 132 Ind., 175, evidence of custom of other companies to maintain the track in the same condition was held properly excluded.

In Hamilton *v.* R. Co., 36 Iowa, 37, the court denied that the particular mode of loading a freight car with timber

shown in that case would not be negligent if that method was used by all railroads.

In Combs *v.* R. Co., 65 Mo., 597, it was held that it was no excuse for leaving a turn-table unlocked that it was the custom of other railroads to do so.

In Helphestone *v.* Medert, 136 Mo., 595, where a grindstone had been run at what was claimed was an excessive rate of speed, evidence was excluded as immaterial and furnishing no defense that the rate of speed of grindstones in other similar factories was the same.

In Champaign *v.* Patterson, 50 Ill., 65, evidence as to a particular construction of sidewalks in other cities and towns of similar size was excluded on the ground that this would be no justification for the defendant's negligence in maintaining such a construction of its sidewalks.

In Louisville, &c., R. Co. *v.* Patterson, 108 Ind., 481, the plaintiff was injured by the giving way of a bridge, which was under repair, while a train was passing over it. The court held that "It was of no consequence whether the appellant used the means and appliances ordinarily used by other railway companies under like circumstances or not, provided they were used in such a manner as to render the bridge unsafe when the train came upon it at the rate of speed shown in this case."

Where a railroad company allowed its employés to throw pieces of wood from a moving train, it was held no answer to the charge of negligence that this had been going on for a long time, and that no one had been hurt before the plaintiff was injured (Fletcher *v.* R. Co., 168 U. S., 135).

In an elevator accident case in which the plaintiff claimed defective construction it was held proper to exclude evidence that no accident of any kind had happened except the one in question during the four and one-half years in which the elevator had been in use (Hodges *v.* Bearse, 129 Ill., 87-91).

Where the plaintiff was injured in Trenton, N. J., by falling into an area opening in a sidewalk, it was held incom-

petent to show that such areas were common in that city; that it was customary to protect them as the one in question was protected; and that over ten thousand persons had passed and repassed the particular area in question annually, ever since it had been constructed, without accident; and that the area was built according to the usual custom (Temperance Hall Association *v.* Giles, 33 N. J. L., 260).

An accident having resulted from the frightening of a horse by a mortar box being left near the highway, it was held incompetent to show that other horses had passed the object and had (or had not) been frightened (Bloor *v.* Town of Delafield, 69 Wis., 273).

A miner having been injured by the falling of an overhanging rock in a mine, it was held no error to exclude evidence that "no accident had ever before happened in the mine" (Burgess *v.* Davis Sulphur Ore Co., 165 Mass., 71).

Where a coupling pin left on a car platform fell off and was struck by a moving car wheel and hurled against the plaintiff, it was held incompetent to show that this result was a kind of accident never before heard of by any one (Doyle *v.* Chicago, &c., R. Co., 4 L. R. A., 420—Sup. Ct. Iowa, 1889).

A railroad employé while helping to make up a train was injured by his foot slipping while he was coupling cars, and his claim was that he slipped because of a defect in the roadway. It was held that the trial judge properly excluded evidence that no other person had ever been injured in consequence of this alleged defect at the place mentioned. "Proof of immunity of other persons from injury would have afforded no sufficient basis for a presumption that the track was sound and safe. 16th Am. & Eng. Ency., p. 457, and cases cited" (Louisville, &c., R. Co. *v.* Kemper, 153 Ind., 618, 663).

In Branch *v.* Libbey, 78 Mo., 321, the plaintiff sued for injuries to himself, his horse, and his vehicle by reason of an alleged defective street crossing. The defendant was allowed

to prove that before and after the plaintiff's accident other persons drove over the crossing without injury. For this error the judgment was reversed, the court holding that evidence as to whether other persons had either passed safely over the alleged defect or had received an injury at that place "is not competent either for the purpose of proving that the way was defective or in suitable condition at the time and place of the alleged injury, or as evidence of the degree of care exercised by the plaintiff," and the court adds that "the entire weight of judicial authority is against the reception of such evidence."

As nearly all the railroads in this country are now controlled by a half dozen men, the contention of counsel for the plaintiff in error here, if sustained by this court, would make those men the judges of what is negligence in railroad construction and operation.

AS TO THE MOTORMAN'S NEGLIGENCE.

There is no question here as to the plaintiff being lawfully on the track when his foot was caught. His parents were expected to return that afternoon, and about the time they were due he and his brothers went to meet them (Eddie, 10, 11; William B. Severe, 13, 14; Mrs. Severe, 15, 16; Earickson, 16).

But without reference to this the plaintiff was lawfully on the track, because he went there to extricate his little brother whose foot had been caught and who was in imminent danger.

The authorities are clear on this point. See Maryland Steel Co. v. Marney, 88 Md., 482-496, in which case the authorities are thoroughly gone over.

The track was perfectly straight for five hundred yards east of Riverdale (Burch, 12). Hawkins, the motorman, as a witness for the defendant, testified that he saw the boys when he was "three or four poles back" (19). He estimates

the distance at about three hundred or four hundred feet, and in this he is corroborated by William B. Severe, who paced off the distance between poles and found it to be between ninety-five and one hundred feet (34).

Hawkins further says that when he was back one hundred and fifty feet he began ringing his gong (19).

Eddie testified that when he came down from the house he, standing a few feet from the track, saw the car coming, and waved his hat, and tried to stop the car; that while the car was still fifty or sixty feet away from him he waved his hat, and was hollering for them to stop (9, 11).

Burch, one of the passengers on the car, says that when he felt the jolt when the brakes were put on he saw two little boys beside the track, and that "they were jumping up and down and hollering" (12).

The plaintiff testified that just before he was hurt he saw Eddie waving his hat up and down and hollering to the motorman; that Raymond came down behind Eddie, and that he was waving, too, both of them, and that he heard Eddie hollering to the man to stop; that he, the plaintiff, was himself waving his hand (16).

Greensmith, a witness called by the defendant, another passenger on the car, says that his attention was called to the motorman by the ringing of the bell repeatedly; that he looked out and saw a larger boy than the one who was injured in the center of the track waving his hand, and that the *next thing* that occurred was that the motorman stopped his car (22, 23).

Bryant, still another passenger called by the defendant, said that he looked out of the car window when it was from *sixty to one hundred yards* from the place where the accident occurred, and that he then saw three boys standing on the platform or crossing. He says he did not think they were near enough for the car to strike them, but they might have been; that he did not continue to look out of the car, but returned to his seat, and had not sat down when the car ran over the boy (24).

Although it was so clearly proved that the boys did warn the motorman that something was wrong, he said in his report to the company, made just after the accident, that no signal was given to him of any kind (21), and he testified at the trial that he did not see either of the boys wave (20). The reliability of this witness' testimony may be judged from the fact that he testified that the boy who was hurt was standing with his face towards him (20). As the boy was facing Washington, with his left foot caught against the rail on the right side of the track, the impossibility of this is manifest. The motorman was also discredited by his stating at the trial that when he rang the bell the boys were running backwards and forwards on the track (20), in which statement he was contradicted not only by Earickson and Eddie, but by the defendant's witnesses, Greensmith and Bryant (9, 10, 16, 17, 22, 24). He was also contradicted by his own report to the company (22).

That the car was going very rapidly is shown by the fact that when the motorman endeavored to stop it there was an unusual and extraordinary jolt. Burch says "that the jolt was unusual enough to make him get out of his seat," that it was the unusual jolt that attracted his attention (12, 13). Greensmith testifies that after he saw the boy in the middle of the track waving his hand the next thing he noticed was the sudden jolt—that there was a jolt, and the car raised up (23).

Bryant says "that the car stopped very suddenly; that he thought that probably caused him to stand there instead of sitting down right away" (24).

Stallings, the conductor, who was on the rear platform of the car, testified "that he noticed the sudden stopping of the car, which was a good deal more sudden than usual" (231).

It is, of course, as usual in these cases, very difficult to fix the distance of the car from the boy when the motorman put on the brakes and reversed the motor. Eddie's testimony was that the car was from 46 feet to 38 feet from

Earickson when he waved to the motorman. In his report to the company the motorman says that when he was about forty feet from the boy, he saw his foot was fast in the track, and immediately applied the brakes (22). In his testimony he said that "when he saw the boy was not going to get off the track, he was about thirty or thirty-five feet away from him."

Burch says that when the car stopped it was about one-half its length beyond the platform (12).

The motorman testified that the car was between thirty-six and thirty-eight feet long. The platform, measured along the course of the road, is about twenty feet wide (34). The plaintiff's foot was caught about the middle of the platform (10).

The distance traversed by the car, therefore, after the motorman was warned was 46 plus 10 plus 38 plus 19 feet, or 113 feet in all. On the motorman's own statement the car traveled over 100 feet after he saw the boy's foot was caught.

We must remember that there were but five passengers in the car, so that its momentum was not great on account of its load; that it was a clear, dry day (21), and that the motorman not only put on the brakes, but reversed the power (19), so that the wheels slipped (Greensmith, 23).

Under these circumstances the plaintiff's counsel might well have asked the court to instruct the jury that as matter of law the motorman was negligent in running down on these children at such a rate of speed.

The general rule applicable to such a situation is stated in 7th Am. & Eng. Ency. of Law, 2d ed., 405 to 408. That rule is that infants under seven years of age cannot be guilty of contributory negligence; that a much higher grade of watchfulness and care must be exercised to avoid injuring young children than would constitute ordinary care towards adults; and that what would be ordinary care towards an adult may be culpable negligence towards a child.

These principles, it is further said, apply with equal force

to idiots, lunatics, and other weak-minded persons, "except that in such cases the very appearance of the person is not necessarily, as it is in the case of children of tender years, a warning to every one that he is not to be held to the adult's standard of ordinary care" (*id.*, 410).

A case illustrating the application of this general principle is Holden *v.* Mo. R. Co., 73 S. W. Rep., 973 (Sup. Ct. Mo., 1903). In that case the motorman of a street car saw a vehicle approaching as if to cross the track in front of his car. He rang his gong, but saw that those in charge of the vehicle did not appear to heed the warning, but drove rapidly on. It was held that in such a case he could not rely on the usual assumption that persons crossing will look and listen, &c., but that he should have got his car under control.

The court of appeals of Virginia applied this doctrine in a case in which, owing to the failure of a motorman in charge of a street car to get his car under control when approaching a frightened horse, an accident happened. In its opinion in that case the court refers to Welsh *v.* Jackson Co. R. Co., 81 Mo., 466, where it appeared that a child was run over and killed by a horse car, and adds:

SLUG SIX.

"Unquestionably greater caution and prudence is required of a street-car company to avoid an injury to a small child on the street than to an adult, for the reason that the servants of the company operating the car may reasonably presume that a person of sufficient size and age, apparently in the possession of all his powers and faculties, will get out of the way of the approaching car, but, when those in charge of the car know, or, by the exercise of reasonable care and prudence, should know, that a person on the track or about to get on the track in front of the car is in such a situation or condition that he is unable to avoid a collision with the car if it continues its course, then, both upon reason and authority, it becomes the duty of those operating the car not only to have the car under control, but, if need be, to stop it in order to prevent injury to the person so situated."

Danville Ry., &c., Co. *v.* Hodnett, 101 Va., 361, 365, 366, 371.

So in Booth on Street Railway Law, section 10 (citing cases in note 6), it is said that a greater degree of caution and vigilance is required to prevent injuries to children and persons who appear to be or are known to be infirm than is required in ordinary cases.

In City Pass. Ry. Co. *v.* Cooney, 87 Md., 261, the facts were that a boy eleven years old was negligently standing on a street railway track with his back towards the point from which the car which injured him came. He started to run just as the car reached him, but stumbled and fell, so that the car struck him, and he lost a leg. In the opinion of the court it is held to be clear that if the motorman saw the plaintiff, or even if by reasonable care he would have seen him, it was for the jury to say whether he could have avoided the accident by getting his car under control. The trial court granted the following instruction at the plaintiff's request:

"That even if the jury should find that there was want of ordinary care and caution on the part of the plaintiff, considering his age and intelligence, as mentioned in the plaintiff's first and second prayers, and testified to by the witnesses, yet the plaintiff is entitled to recover; provided the jury find the other facts set out in the first and second prayers of the plaintiff, and further find from the evidence that the servant or servants of the defendant could have avoided the injury complained of by the exercise of ordinary care and caution after such servant or servants of the defendant saw that the plaintiff was in danger of being struck by the car of defendant, or might by ordinary care and prudence have seen that the plaintiff was in such position of danger."

The following is an extract from the opinion of the court:

"Then, again, if it be true that the plaintiff was standing in the center of the track, with his back towards the car, the question whether the motorman used due care to avoid the accident was also necessarily submitted to the jury. The track was straight between Caroline and Spring streets, with

an unobstructed view of it from one street to the other, and we know of no principle that would permit the court to say that under such circumstances the motorman was not guilty of negligence, assuming, as we have said, the plaintiff's evidence to be true. If he was thus standing on the track the motorman could not have failed to see him if he exercised even a much less degree of care than is required of him, and if he did see him in that position *it was manifestly his duty to check the speed of his car or have it under control*, but the evidence shows that the car was not stopped until it had gone some distance beyond Spring street.

"If the plaintiff did stand with his back in the direction from which the car approached on that track for three or four minutes, as he says he did, he was clearly guilty of negligence. He was eleven years of age, was at that time in the fourth grade of the grammar school he attended, lived near Bank street and went to school on it. Without some evidence that he was deficient in his mental faculties, and there was none, a boy of his age and opportunities must be presumed to know that it was negligence on his part to thus place himself on the railroad track. But, as we intimated above, that would not justify the motorman in running over him. Although the plaintiff may be guilty of negligence, the defendant cannot thereby excuse itself if by the exercise of due care its agent could have avoided the accident after discovering the negligent party in his perilous position. The evidence of the plaintiff's witnesses was amply sufficient to authorize the court to submit the question to the jury. The cases in this State are so numerous on that subject that we will only cite some of those in which street railways have been parties. Arureich's case, 78 Md., 589; McKewen's case, 80 Md., 593; Appell's case, *ibid.*, 603. This rule, which has been adopted as an exception to or modification of the general doctrine that a plaintiff who is guilty of contributory negligence cannot recover, is a very just one, as the law will not permit the loss of life, limb, or even property, to be deliberately and carelessly inflicted, when it could by reasonable care and caution be avoided, merely because the injured person was negligent, but the rule should not be extended too far, but should be kept within proper bounds. When it is clear that the plaintiff was guilty of negligence there must be evidence from which the jury can fairly and reasonably find the defendant liable for violation of duty after the plaintiff

has thus negligently placed himself in danger, in order to avoid the legal effect of his own negligence. But in this case the evidence of the plaintiff shows that the motorman must either have seen him in the perilous position he occupied in time to warn him or stop the car, or must have failed to see him after he had gotten on the track, because he was not using such care as was required of him while thus rapidly moving through one of the public streets of the city. The second prayer offered at the close of the plaintiff's testimony was therefore properly rejected."

By many other courts the doctrine thus laid down by the Maryland court of appeals has been applied in cases where young children have been injured because the persons in charge of a railway car (street or steam) when observing such children on or near the track have taken it for granted they would get out of the way, and failed to get the car or train under control.

Each of the following cases is precisely in point:

Mo., &c., Ry. Co. *v.* Hammer, 78 S. W. Rep., 708 (Tex. Civ. App., 1904).

Louisville, &c., R. Co. *v.* Vanarsdell's Adm'r, 77 S. W. Rep., 1103 (Sup. Ct. Ky., 1904).

Wallace *v.* City & Suburban R. Co., 25 L. R. A., 663 (Oregon, 1894).

Ind. St. Ry. *v.* Bordenchecker, 70 N. W. Rep., 995 (33 Indiana Appeals, 138).

Ind. St. Ry. Co. *v.* Schomberg, 71 N. W. Rep., 237 (Ind. App., June, 1904).

Levinston *v.* Wabash Ry. Co., 170 Mo., 452, 469-471.

Strutzel *v.* St. Paul, &c., Ry. Co., 47 Minn., 543.

Gray *v.* St. Paul City Ry. Co., 87 Minn., 280.

Forrestal *v.* Milwaukee, &c., R. Co., 119 Wis., 495.

THE INSTRUCTION AS TO THE MEASURE OF DAMAGES.

The instruction which is complained of on this point gave the jury to understand in substance that if their verdict should be for the plaintiff they should compensate him (1) for pain; (2) for inconvenience; (3) for mental suffering; (4) for pecuniary loss.

This instruction is in substance exactly the same as an instruction in another case originating in the District of Columbia which was approved by this court. (See W. & G. R. Co. *v.* Harmon, 147 U. S., 571, 573, 584.)

The objection made to this prayer was to it as a whole and not to any part of it. The exception based upon the overruling of this objection cannot, therefore, be sustained if any proposition contained in the prayer is sound.

It is admitted that if the plaintiff was entitled to recover at all he was entitled to recover for pain and inconvenience. The exceptions growing out of the refusal of the court to sustain the general objection to this prayer should, therefore, be overruled (Langdon *v.* Evans, 11 App. D. C., 464; R. Co. *v.* Mackey, 157 U. S., 72).

Again, in Texas & Pac. Ry. Co. *v.* Cody, 166 U. S., 606, the charge on the subject of damages was very general (612, 613). Objection being made to it, this court said:

"If the railway company had desired particular instructions in reference to the measure of damages, it should have requested them, which it did not do."

Earnings.

If, therefore, the defendant's counsel had in this case wished the court to limit the pecuniary loss for which the plaintiff could recover to loss occurring after he should become of age, they should have asked the court to so instruct the jury. If the law be, as they contend, that a minor is

not entitled to money that he earns by his own labor during his minority, then the instruction is technically correct, because it limits the recovery to such loss as *the plaintiff* was reasonably likely to sustain thereafter. Where a question of law is involved, and neither the plaintiff nor the defendant asks for any instructions in regard to it, and the court says nothing about it, the jury must be presumed to know the law, and to render their verdict accordingly.

In Texas & Pac. Ry. Co. *v.* Humble, 181 U. S., 57, 67, in which case a married woman sued for personal injuries and was allowed, pursuant to statute, to recover for loss of earning capacity, it was contended that as the husband was entitled to her services in the household he alone could recover for such services; but this court held that the jury probably understood the instruction as having relation to earnings on her own account, and if defendant wished this to have been more explicit, it should have so requested.

But it is not the law that a minor may not claim and recover his earnings. The law gives that privilege in the first instance to the father, but it is a privilege only and the father may waive it. He does waive it when he brings a suit in the child's name by himself as next friend, and in that way, as well as by his presence at the trial and giving testimony in the case, assists the child to recover the earnings to which he, the father, would be entitled if he should see fit to claim them. This proposition is so clear on principle that it hardly seems necessary to refer to authority on the subject. It will be found, however, that it has been so held in Baker *v.* R. R. Co., 91 Mich., 298, 306; C. & O. Ry. Co. *v.* Davis, 60 S. W. Rep., 14 (Sup. Ct. Ky., 1900); Abeles *v.* Bransfield, 19 Kan., 16, 20.

In R. Co. *v.* Morin, 66 Texas, 225, it was held that the court had erroneously allowed a minor to recover for earnings during minority, but the decision was based on the express ground that not only had the father not relinquished his own claim in that regard, but he had already recovered a

judgment of $7,950 against the railroad company for loss of the son's services.

It is contended in the opposing brief in this case that the jury should not have been allowed to take loss of earnings into consideration, because there was no evidence as to what the earning capacity of the plaintiff was. If sustained, this proposition would mean that in no case can a little child recover for loss of earning capacity because no evidence on the subject is possible. Any member of the jury can make as good an estimate of what that loss will be as any possible witness in the case, because until a child's faculties are developed and it has done something in the way of choosing a vocation in life the whole matter is at large. Nearly all the cases which are cited on this subject in the adverse brief are cases in which the plaintiff was an adult, and no evidence was offered as to his earnings or earning capacity. Of course a different rule would obtain in such a case, because other evidence is possible.

That a child may recover for loss of earnings, and that no evidence on the subject is required, has been held in several well-considered cases. (See Roseakranz *v.* Lindell Ry. Co., 108 Mo., 9, 16, 17; Schmitz *v.* Railway Co., 119 Mo., 256, 269, 279; R. Co. *v.* O'Donnell, 58 Texas, 27.)

Mental Suffering.

Counsel for the plaintiff in error insist that this instruction is erroneous because it allowed the jury to give the plaintiff compensation "for mental suffering, past and future." The objection seems to be that the jury may have been led by this phrase to allow the plaintiff compensation for humiliation and mortification resulting from the consciousness that he is a cripple.

But since it is conceded, as it must be, that mental suffering in general is as proper a subject of compensation in personal-injury cases, as physical suffering, it was the duty of the defendant's counsel, if they conceived that the jury might

be misled by this language, to ask for a definite instruction on that subject. The case of Texas & Pac. Ry. Co. *v.* Humble, 181 U. S., 57, 61, seems to be decisive on this point.

But there are two other replies to this objection. In the first place, the trial court limited the mental suffering which the jury might take into consideration to that which the jury should find "to be the natural and necessary consequence of the loss of his leg." This necessarily excluded mere mortification from disfigurement, because that is not a necessary result of such an injury. In this regard men differ greatly among themselves, and men in general differ from women. Most women on losing a limb would suffer intensely in this way. Some men would; others would not. Many men who have lost a limb make a good living by exhibiting their deformities and asking for alms in consequence of it. It is not even unknown that men have feigned to have lost limbs for the purpose of extracting charity form the compassionate.

But in the second place, if the trial court committed any error in this regard in the instruction in question, it was in not plainly telling the jury that they should allow for injury to the plaintiff's feelings resulting from his being a cripple for life.

In cases of slander and libel, injury to the feelings is the principal and often the only subject of compensation. If it is published of a man that he is a thief, or of a woman that she is a prostitute, heavy damages are allowed for the mortification of being subjected before the community to such imputations. And if a woman by the negligence of another should have her face disfigured, or if a man should be deprived of one of his limbs in the same way, why should there not be compensation for the injury to the feelings in that case, too? While there are some cases which hold to the contrary, the weight of authority is distinctly in favor of allowing damages in personal-injury cases for injuries to the feelings. The law is so stated in 8th Am. & Eng. Ency,

of law, 2d ed., p. 664, and in note 1 to that section. Among the leading cases to the same effect are Heddles *v.* R. R. Co. 77 Wis., 228, 230, 231; Railroad *v.* Wood, 48 Ga., 565, 569, 570; Gray *v.* Washington Power Co., 30 Wash., 665, 673, 674; Chicago, &c., Ry. Co. *v.* Krempel, 103 Ill. Apps., 1.

It is surprising to find that counsel for the plaintiff in error in this brief here have undertaken to state what counsel for this boy said to the jury on this question in the argument. There is nothing in the record on that subject. It is not admitted that appellant's counsel have correctly stated what was said. And whatever was said, they either took no exception to it or did not think it worth while to incorporate it in their bill of exceptions, which is all that need be said on the subject here.

There is no question that besides compensation for physical pain in actions for damages for personal injuries, the plaintiff is entitled to recover for mental suffering, past and future. The general rule on this subject is well stated in 8th Am. & Eng. Ency. of Law, 2d ed., 658; 660, note 1. No evidence is required as to the amount of the damages resulting from mental suffering, that being a question about which the jury is supposed to know as much as anybody else (*Id.*, 659–670; note 2, cases).

In Kennon *v.* Gilmer, 131 U. S., 22, 26, 27, this court held it proper to instruct the jury in assessing damages to take into consideration the plaintiff's "bodily *and mental* pain and suffering taken together," such as "inevitably and necessarily resulted from the injury."

In City of Panama, 101 U. S., 453, 464, an admiralty case in which the court fixed the damages without a jury, it is said that where a suit is brought to recover damages for personal injuries "there cannot be any fixed measure of compensation for the pain *and anguish of body and mind*, but the matter must be left to the good sense of the tribunal which is to fix the plaintiff's compensation."

In District of Columbia *v.* Moulton, 15 Apps. D. C., 363,

367, 368, 379, a personal injury case decided in 1899, the court, speaking through Chief Justice Alvey, said the prayer relating to the measure of damages "was free from any substantial ground of objection." That instruction was as follows:

"The jury are instructed that if their verdict be for the plaintiff, they should allow him: First, reasonable compensation for the physical pain *and mental anguish* which he has sustained in the past *and for that which the jury may find from the evidence he is likely to endure in the future*, as the direct result of the injuries received by him at the time of the accident in question; and, second, the amount of pecuniary loss, if any, which the court may find from the evidence he has sustained in consequence of said injuries by being rendered less able to earn money in the practice of his profession, and also such pecuniary loss of the same kind, if any, as the jury may find from the evidence he is likely to sustain from said cause in the future."

(Moulton's case was reversed here (— U. S., —), but the foregoing instruction was not referred to in the opinion of this court, it being held that the plaintiff could not recover at all.)

In Larmon *v.* District of Columbia, 5 Mackey, 330, 333, the court in general term held that in estimating the damages in a case of this kind the jury are to consider the plaintiff's "pain and suffering, *mental and physical*."

In Nichols *v.* Brabazon, 94 Wis., 549, 552, it was held correct to instruct the jury to compensate the plaintiff for "*mental suffering in the future*, if any, by reason of such physical impairment, if you find that the evidence shows that there will be physical impairment in the future."

In Railway Co. *v.* Sponier, 84 Ind., 165-171, an instruction to the jury was approved in a personal-injury case, which directed the jury if they found the plaintiff was permanently disabled to add to the compensation allowed on other grounds "a just compensation for her *anxiety and distress of mind* as are fairly and reasonably the plain consequence of the injury complained of."

In Fairchild *v.* Stage Co., 13 Cal., 599, it was held proper to instruct the jury to allow damages for the plaintiff's "mental anguish," the court observing that it could not see why compensation should not as well be given for pain of mind as for pain of body.

Other cases to the same effect are Md. Co. *v.* Marney, 88 Md., 482; Ry. Co. *v.* Case's Adm'r, 72 Ky., 736; L. & N. R. Co. *v.* Longsdon, 71 S. W. Rep., 905; 114 Ky., 746; Baker *v.* City of Independence, 93 Mo. App., 169; Ashley *v.* Sioux City, 93 N. W. Rep., 303 (Sup. Ct. of Iowa, 1903); Batten *v.* Transit Co.; 76 S. W. Rep., 727; 102 Mo. App., 285.

Other interesting cases illustrating the tendency of the courts in modern times to allow damages for mental suffering are the following:

Owing to the failure of the defendant to deliver a telegram, the plaintiff was compelled to tramp four hundred miles, suffering on the way great privation and mental distress. The rule as to damages for mental anguish was thoroughly considered by the court, and a long list of cases is cited in support of the proposition that mental suffering is a proper subject of damages with or without accompanying physical suffering. The conclusion of the court is expressed thus: "If mental suffering can be recovered in any case, what difference will it make whether there were physical suffering or not" (Barnes *v.* Wes. Union Tel. Co., 76 Pac. Rep., 931; 27 ev., 438).

Where a woman was ordered out of a place of public resort because she was erroneously taken for a woman of bad reputation, it was held, on great consideration, that recovery could be had for her mental suffering alone (Davis *v.* Power Co., 77 Pac., 209—Sup. Ct. of State of Wash., 1904).

Where plaintiff had reasonable ground for fearing that blood poisoning would result from his injury, it was held that this apprehension on that score was mental suffering, which should be taken into consideration as an element of the damages to be allowed him—as proper an element as the

actual physical injury causing it (Butts *v.* Nat. Exch. Bank, 72 S. W. Rep., 1083—Mo. Ct. Apps., 1903).

So where the plaintiff was bitten by the defendant's dog, and was in fear of hydrophobia, it was held that this mental distress should be taken into consideration in estimating the damages (Godeau *v.* Blood, 52 Vt., 251-254).

Instructing the Jury Not to Exceed the Amount Claimed in Declaration.

In instructing the jury as to the measure of damages, the trial court observed, parenthetically, that they could not allow an amount greater than that claimed in the declaration. As already seen, the exception to this instruction was general—this particular part of the instruction, so far as the record shows, not being called to the attention of the court. In the general charge to the jury, the jury were for the first time informed what is the amount claimed in the declaration—$25,00—and no exception was taken to this part of the charge (45). The court went on and told the jury that the mentioning of the amount claimed in the declaration was not a suggestion to the jury that they should take that as a criterion; that it was only a limit beyond which they could not go; that it was not a suggestion that they should go to that amount, and that the question was simply "what is proper compensation," &c.

Even if there had been a proper exception in the case, the point is covered by the opinion of the Court of Appeals of the District of Columbia in Railroad Company *v.* Hickey, 5 App. Cas. D. C., 436-474.

In T. & P. R. Co. *v.* Cody, 166 U. S., 606, the court instructed the jury in precisely this way, but it seems not to have occurred to counsel in the case or to this court that there was anything objectionable in this method of charging the jury. On the contrary, this court says the instructions in the case gave the law to the jury with substantial correctness.

And on principle, unless a jury is told that they cannot exceed the amount claimed in the declaration, they may fall into the error of rendering a verdict in excess of the amount claimed. In that event the plaintiff is at the mercy of the court; because while the court may reduce the amount in entering judgment it is not obliged to do that, but may grant a new trial. It is the duty, therefore, of the plaintiff's counsel in such a case to see that the jury is informed as to the amount claimed in the declaration, and told that they must not exceed it. If such instruction seems by itself likely to mislead the jury, the defendant's counsel may ask the court to guard against such a result. But, in this case, the court did that of its own motion.

On the whole, it is submitted that the judgment of the Court of Appeals of the District of Columbia should be affirmed, with costs.

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